Petition

81-461

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL ALEXANDER
Petitioner,
v
CHRYSLER CORPORATION
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

WAS THE PLAINTIFF ENTITLED TO A JURY TRIAL AS A MATTER OF RIGHT ON HIS CLAIM FOR MONEY DAMAGES UNDER THE VETERAN'S REEMPLOYMENT RIGHTS ACT, 38 USC § 2021?

SUBJECT INDEX

	Page
Question Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Relief Sought	11
Appendix A — Opinion of the U.S. District Court for the Eastern District of Michigan	12
Appendix B — Opinion of the U.S. Sixth Circuit Court of Appeals	20

INDEX TO AUTHORITIES

Cases:

Beacon Theaters v Westover, 359 US 500, 505 (1959)	11
Byrd v Blue Ridge Cooperative, 356 US 525, 538 (1958)	9
Curtis v Leother, 415 US 189, 195 (1974)	8
Dairy Queen Inc. v Wood, 369 US 469, 479 (1962)	8
Delman v Federal Products Corporation, 251 F2d, 123 (1st Cir. 1958)	7

Page

Minnis v UAW, 531 F2d 850, 852 (8th Cir. 1975) 10

Rogers v Exxon Research and Engineering Company, 559 F2d 834, 838 (3rd Cir. 1977) ... 8,10

Ross v Bernard, 396 US 531, 537-38 (1970) 9

U.S Constitution:

U.S. Constitution, Amendment VII 2

Statutes:

28 USC § 1254(1) 2

28 USC § 2072 9

38 USC § 2021 3

38 USC § 2022 3

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Michael Alexander, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit issued as a mandate in these proceedings on July 1, 1981.

OPINIONS BELOW

The Orders of the trial court denying Defendant's Motion to Strike Plaintiff's Jury Demand (entered on August 27, 1979 prior to trial) and refusing to reconsider that ruling (entered on October 16, 1979 subsequent to trial) and the trial court's opinion rendered from the bench on October 12, 1979 are reproduced as Appendix A.

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed as an Order on June 9, 1981 and issued as a mandate on July 1, 1981, reversing the trial court's decision as to availability of a jury trial is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC § 1254(1).

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed on June 9, 1981 in the form of an Order which was issued as a mandate on July 1, 1981. This Petition for Certiorari was filed within ninety (90) days of the filing of the Order/Opinion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Seventh Amendment to the United States Constitution:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a

> jury be otherwise re-examined in any court of the United States, then according to the rules of the common law."

38 USC § 2021 provides, as pertinent to this case, that:

> "In the case of any person who is inducted into the armed forces of the United States . . . for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and . . . makes application for re-employment within ninety (90) days after such person is relieved from such training and service . . . shall [i]f still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay . . . and shall not be discharged from such position without cause within one year after such restoration or re-employment."

38 USC § 2022 provides for jurisdiction of the United States District Courts over actions seeking relief from conduct of employers in violation of the preceding section.

STATEMENT OF THE CASE

1. PROCEEDINGS BELOW

On February 14, 1978, Plaintiff Michael Alexander filed a complaint with the United States District Court for the Eastern District of Michigan seeking, "judgment against the Defendant in whatever sum he is found to be entitled in excess of $10,000.00 . . ." pursuant to his claim that his employer, Chrysler Corporation, had violated rights

accorded to him by the Veterans' Re-Employment Rights Act. No equitable relief was sought, only money damages for lost earnings. Plaintiff filed a timely demand for jury trial.

Prior to trial, Defendant Chrysler Corporation sought to have the district court strike Plaintiff's jury demand. That request was refused and the case was tried to a jury which returned a verdict in the amount of $55,000.00. Subsequent to trial, Defendant Chrysler Corporation requested the trial court to reconsider the earlier ruling as to Plaintiff's jury demand and set the verdict aside on the basis that Plaintiff had not been entitled to a jury trial. The district court again refused that request.

Defendant Chrysler Corporation appealed to the United States Court of Appeals for the Sixth Circuit which reversed the ruling of the trial court, setting aside the jury verdict and remanding the case for decision by the district judge.

2. FACTUAL SUMMARY OF THE CASE

Plaintiff was a Chrysler Corporation employee who left his employment on a military leave of absence and was reinstated to his employment after returning from that military leave of absence on December 8, 1975. Plaintiff was thereafter discharged by Defendant Chrysler Corporation, his last day of work being January 14, 1976.

On January 14, 1976 Plaintiff Michael Alexander became involved in an argument with his immediate supervisor, during which the supervisor announced that Plaintiff was fired. Thereafter, against Plaintiff's express request, the supervisor made two offensive physical contacts with Plaintiff, to which Plaintiff retaliated, in a

simple attempt to keep the supervisor away from him (App. 67, 141-142, 158).[1]

Chrysler Corporation's version of this incident was that Plaintiff had refused to perform his assigned job and was threatening the supervisor by running up to him as if to hit him (App. 149). That version of the incident was directly contradicted by Plaintiff's testimony (App. 57-69) and by another Chrysler employee (App. 142).

On January 14, 1976, following this incident, Plaintiff was directed to report to the Labor Relations office the following day (App. 157). On January 15, 1976, following the Labor Relations office meeting, Plaintiff was discharged with a separate written notice stating the cause for discharge was "assaulting and striking" a supervisor (App. 156).

This procedure was typical and conformed with standard Chrysler Corporation policy since discharges were not supposed to be finalized until after such review (App. 87).

The only evidence adduced by Chrysler Corporation to indicate that there was any consideration in Plaintiff's discharge other than the altercation between Plaintiff and the supervisor was a written statement dated some twelve days later and written in response to a union letter of protest regarding Plaintiff's earlier discharge (App. 165). Such a lapse of time prior to finalization of a discharge was neither typical nor acceptable to Chrysler (App. 89). Furthermore, this written statement, purporting to consider Plaintiff's "prior record" was rewritten and edited at least twice during the period between January 15 and January 27 (App. 103).

---

[1] Page references are to the Joint Appendix filed with the Sixth Circuit Court of Appeals.

Furthermore, granting for the sake of argument Chrysler's contention that plaintiff's past record was a consideration in his discharge, Chrysler's evidence with respect to that "past record" was, at best, equivocal and inconclusive. Chrysler produced testimony to the effect that Plaintiff was involved in one argument with a foreman but without any evidence as to what caused the argument or who was in the right (App. 114). Chrysler produced evidence that Plaintiff was involved in another argument with a foreman which was started by the foreman's interrupting Plaintiff in the exercise of his contractual right to discuss a grievance with his union steward (App. 127-129). In each of those instances, Chrysler higher management rejected the recommendation of the foreman that Plaintiff be discharged (App. 131, 161).

Defendant Chrysler Corporation considered fighting or other disorderly or disruptive conduct as a potential cause for discharge and that rule applied to all employees (App. 96, 166). The identity of the aggressor in a physical altercation ordinarily is a factor taken into consideration and the aggressor is the more likely person to be discharged (App. 105-106). The supervisor involved was not discharged or otherwise disciplined as a result of the physical altercation which he started with Plaintiff on January 14, 1976 (App. 105).

Subsequent to his discharge Plaintiff filed a Worker's Disability Compensation claim against Defendant Chrysler relating to a prior job-caused injury. That claim was settled in May, 1979 and at that time Plaintiff resigned any future employment rights with Defendant Chrysler Corporation (App. 5, 159, 160). During the three and one-quarter years between Plaintiff's discharge and his waiver of future employment rights with Chrysler (at

the time of settlement of His Worker's Disability Compensation claim) employees with classifications comparable to Plaintiff's earned as much as $65,714.69 in wages and fringe benefits (App. 59-60, 151, Plaintiff's Exhibit #1).

3. REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit Court of Appeals in this case should be reviewed for the following reasons:

1. The decision below is in conflict with the construction placed upon the same statutory provision by the First Circuit Court of Appeals in *Delman* v *Federal Products Corporation*, 251 F.2d, 123, 1st Cir. (1958) in which that Court of Appeals held:

> "The plaintiff's claim for reinstatement in his employment is essentially equitable in its nature and his claim for damages for failure to reinstate is essentially legal. These claims were made in a single complaint, but as this court pointed out in Orenstein v. United States, 1 Cir., 1951, 191 F. 2d 184, 190, and confirmed in Chappel & Co. v. Palermo Cafe Co., 1 Cir., 249 F. 2d 77, the fact that separate and distinct equitable and legal claims are joined together in a single complaint does not necessarily mean that the action at law is a mere adjunct or appendage of the suit in equity."

Further, the holding of the Sixth Circuit Court of Appeals in this case that:

> "The fact that the Plaintiff sought only monetary relief is not determinative since the particular monetary relief sought has been deemed restitution rather than legal damages."

is a holding which is in direct conflict of the position adopted by the Third Circuit Court of Appeals in *Rogers* v *Exxon Research and Engineering Company*, 550 F.2d 834, 838 (3rd Cir., 1977):

> "A suit for damages consisting of back wages arising out of the breach of an employment agreement is a routine contract action where the parties would be entitled to a jury under the seventh amendment. The fact that the right to recover wages is granted not by common law but by statute does not change the essential nature of the case."

2. The decision below is in clear conflict with prior holdings of this Court construing the constitutional guarantee to the right of jury trial in circumstances where the relief sought is, arguably, equitable:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury — that based upon the view that the right to trial by jury may be lost as to legal issue where those issues are characterized as "incidental" to equitable issues — for our previous decisions make it plain that no such rule may be applied in the federal courts." *Dairy Queen Inc.* v *Wood*, 369 US 469, 479 (1962).

> "But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights remedies of the sort typically enforced in an action at law." (footnote omitted) *Curtis* v *Leother*, 415 US 189, 195 (1974).

3. This case presents far-reaching policy questions implicating "the federal policy favoring jury decisions of disputed fact questions," *Byrd* v *Blue Ridge Cooperative*, 356 US 525, 538 (1958), which should be clearly resolved by this Court in the interests of judicial economy and efficiency in the trial courts.

As the district court pointed out in this case:

> "It's a very difficult area. I have been struggling with it in other matters.
>
> How do you combine the problem when you have a 1981 action with a Title VII action? How do you handle the problem when you have combined claims under Title VII and the state Civil Rights Act where there is probably a right to a jury trial? All of these things are very troublesome. I don't think the district courts have had real good guidance from the Supreme Court. The technical argument the defendant makes is very impressive but at the same time a couple recent cases in other areas in the United States Supreme Court have gone a long ways recently in reaffirming a right to jury trial as a matter of constitutional right in even some statutory claims that are similar to common law claims." (Hearing on Motion to Strike Jury Demand, August 10, 1979)

This Court has clearly established three factors to be considered in determining whether or not a party litigating a statutory claim in the federal courts is entitled to the jury trial guaranteed by the seventh amendment and by 28 USC § 2072. As set out in *Ross* v *Bernard*, 396 US 531, 537-38 (1970), those factors are:

> (1) Custom prior to the merger of law and equity in the district courts;

(2) The remedy sought;

(3) The practical abilities and limitations of juries.

The "remedy sought" in this case never was anything more than simple monetary relief, as can be seen by consulting the *ad damnum* clause of Plaintiff's complaint:

> WHEREFORE, Plaintiff requests judgment against the Defendant in whatever sum to which he is found to be entitled in excess of Ten Thousand Dollars ($10,000.00) together with interest, costs and attorney fees. (Complaint, p. 2)

No Claim for reinstatement or any other equitable relief was ever asserted.

There is no "pre-merger custom" to be consulted, since the merger of law and equity in the federal courts predated adoption of this statute. However, if one were to analogize to the common law, this claim is clearly "legal" as pointed out by the 8th Circuit Court of Appeals in *Minnis* v *UAW*, 531 F.2d 850, 852 (8th Cir. 1975) or by the 3rd Circuit in *Rogers* v *Exxon Research and Engineering Co*, 550 F.2d 834, 838 (3rd Cir. 1977):

> A suit for damages consisting of back wages arising out of the breach of an employment agreement is a routine contract action where the parties would be entitled to a jury under the Seventh Amendment. The fact that the right to recover wages is granted not by common law but by statute does not change the essential nature of the case.

Finally, in evaluating the impact of "the practical abilities and limitations of juries" it should be readily apparent that this case presented the classic fact-question "who struck whom first?" Juries are called upon to answer that precise question in civil and

criminal litigation every day of the week and in every court in the country. Resolution of the kind of credibility questions and factual conflicts presented by this case is the prototypical fact-finding function of a jury. This case presented absolutely no complex, technical and lengthy problems which might be more suited to evaluation by professionals.

The position adopted by the Sixth Circuit Court of Appeals in this case that the monetary relief sought by Plaintiff should, by simple rhetoric, be characterized as "equitable restitution" simply cannot be reconciled with the constitutional guarantee of the right to jury trial. It is axiomatic that "equity has always acted only when legal remedies were inadequate . . ." *Beacon Theaters* v *Westover*, 359 US 500, 505 (1959). In ignoring that basic principle of equity, the decision below vitiates one of the most important tenets of our system of jurisprudence.

RELIEF SOUGHT

Petitioner respectfully respects that a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit shall issue and that this Court shall reverse the Judgment and Order of that court with directions to reinstate the jury verdict rendered in this case.

Respectfully submitted,

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Dated: August 31, 1981

APPENDIX A

ORDER DENYING DEFENDANT'S
MOTION TO STRIKE DEMAND FOR JURY

(United States District Court
Eastern District of Michigan
Southern Division)

(Michael Alexander, Plaintiff, vs Chrysler Corporation, Defendant. Civil No. 78-70336)

At a session of said court held in the Federal Building and U. S. Courthouse, Detroit, Michigan, on August 27, 1979.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

The defendant's motion to strike the plaintiff's demand for jury trial was taken under advisement. It is the opinon of the Court that where, as here, the Plaintiff seeks only money damages for an alleged violation of the Vietnam Veterans' Readjudgment [*sic*] Assistance Act of 1974, 38 U.S.C. 2021(b)(1), the plaintiff is entitled to a jury trial.

IT IS THEREFORE ORDERED that the defendant's motion to strike the plaintiff's demand for jury trial be and the same is hereby DENIED.

/s/ JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

(*certificate omitted in printing*)

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; MOTION FOR RECONSIDERATION OF MOTION TO STRIKE THE JURY DEMAND AND JUDGMENT NOTWITHSTANDING THE VERDICT; AND ALTERNATIVE MOTION FOR NEW TRIAL

(United States District Court
Eastern District of Michigan
Southern Division)

(Michael Alexander, Plaintiff, vs Chrysler Corporation, Defendant. Case No. 78 870 336)

This cause having come on to be heard on Motion for Judgment Notwithstanding the Verdict; Motion for Reconsideration of Motion to Strike the Jury Demand and Judgment Notwithstanding the Verdict; and Alternative Motion for a New Trial; all brought on behalf of Defendant Chrysler Corporation; and the Courts have read and filed the pleadings of the parties and having heard the arguments of counsel for both parties in open Court and being fully advised in the premises:

IT IS HEREBY ORDERED that each of the above described post-trial motions on behalf of Defendant Chrysler Corporation be and is hereby denied.

JAMES P. CHURCHILL,
U.S. District Judge

Approved as to form:

/s/ Nicholas J. Rine, Attorney for Plaintiff
Timothy H. Howlett, Attorney for Defendant

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

* * *

(12) . . . The decision has to be Chrysler's decision and the testimony was that you take into account the past events that the foreman on the floor doesn't have the authority to fire, that it has to go to labor relations, and, as you remember, plaintiff himself testified he was fired by Mr. Ector. Mr. Ector was the person in Labor Relations.

The Court: You had testimony to that effect. What if the jury just didn't believe it and really believed that everything Chrysler did was just so much covering up, their minds had been made up so they were just making a record.

Mr. Howlett: I think the jury was flat-out wrong if that is what they believed because that was the testimony from both plaintiff and defendant. Plaintiff said he was fired by Mr. Ector.

The Court: He also testified he was earlier fired.

Mr. Howlett: That Mr. Robbins told him he was fired, that's right.

The Court: Okay.

Mr. Howlett: Thank you.

The Court: This is a troublesome case. First, because I had a great deal of difficulty in trying to make a correct decision as to whether or not there (13) should be a jury trial.

After over 200 years under our Constitution, and I don't know how many thousands of reported decisions

in dealing with the issues, the latest cases that came out of Washington in this area just left us absolutely right out in the open. They seem to be particularly out in the open in civil rights type of litigation. This is a civil rights case, a little unusual, a veteran's case, but because of the interplay between 1983 and Title VII is giving me, and I think other judges a great deal of trouble on the jury-nonjury issue, on one hand back pay is equitable and on the other hand it is damage, and the same element of damage is both equitable and back pay, depending on who happens to be deciding it.

This whole area of whether or not there should be a jury trial is troubling. Perhaps I am wrong but when I have a difficult time deciding one way or the other and I'm just not certain with respect to a jury trial or non-jury trial, and there is a timely demand I give more weight to the Constitution that gives people a jury trial unless there isn't one, virtually.

I am going to deny the motion for a new trial or for a non-jury type of decision in this case because I am satisfied that the Court was probably right in granting a jury. I indicated there was enough doubt in (14) my mind that the Sixth Circuit said, "Well, the judge should decide the case" and perhaps I should go ahead and make factfindings on the record and I certainly believe there is authority that if there is no right to a jury trial and the judge heard all of the evidence, that it is not inappropriate for the case to be remanded to the judge for him to make a decision, he or she, to make a decision on the record what they heard.

It has been several weeks since the trial itself. If there is an appeal there will be a transcript and I think I would be presumptuous to go ahead and make any factfindings now. If the Sixth Circuit decides there should not have

been a jury trial and asks this Court to make factfindings I will do it at that time after I had a chance to review the transcript. I don't have a transcript, just your brief, which will refresh my mind as to the actual testimony because if there is a new trial, in addition to the issue of liability there might very well be an issue of damages. The Court would have to give very careful consideration of the testimony, too, and might arrive at a different result than the jury did with respect to the issue of damages.

One of the more difficult things to conceive in this case is the jury's total disregard, almost total disregard of the plaintiff's duty to mitigate. He (15) had a job, if I remember correctly, and quit it because it wasn't paying enough. I think it's a sorry excuse myself. I'm candid about that. I think a person has a duty to earn what they can earn but at the same time I don't remember the defendant arguing this very vigorously to the jury. They took their chance on that issue. The jury threw it right back at them.

Of course, there is the other side of the argument. After somebody fires someone for striking their foreman it makes it all the more difficult to get a decent job, I appreciate that.

In any event I'm not going to go ahead and make any factfindings.

Should I grant a judgment notwithstanding the verdict? No, I should not, I don't believe. There were two versions as to when this man was fired. If he was ultimately discharged after; if the final real decision to discharge him was made at the close of these administrative processes within Chrysler and then if you weigh his past history both before and after he was in

service then I would say the judgment is against the weight of the evidence.

I don't think you can say he was effectively discharged after Chrysler was aware of his past history and made that final decision. It's our experience that initial decisions on the floor of the factory isn't [*sic*] (16) always the final decision. However, it's very possible for a jury to find under these facts that they were going to back up that foreman and everything they did after that time was just whitewashing a decision that was already made.

The plain truth of the matter is that the only evidence we heard was that the foreman announced that he was fired. I don't know if he used the word "fired" or what. Then I believe there was some conflicting testimony, at least it was a little difficult to sort out, there was testimony the foreman stepped on his toe and about the same time there was some physical contact. It gets kind of muddled. I'm not sure what the jury determined in that respect.

If the jury really determined he was fired prior to the time there was any physical contact there is no showing whatsoever that the foreman that made the initial decision was any way even aware of this man's previous record.

In that respect probably the reason we have the result we did was that for whatever reasons, sufficient unto themselves, presumably, Chrysler never produced the foreman. We only heard the first person's testimony of the two participants. Chrysler made a studied decision for their own reasons and committed themselves (17) during the deposition not to call the foreman.

I haven't seen a jury yet that only heard one side of a fight that didn't decide in favor of the witness when they

only heard one side, particularly when no good excuse is offered for not producing the other. I think whatever Chrysler's reasons were for not producing them they were never explained to the Court satisfactorily or the jury and they may very well have just said, "We only heard one side, why don't we believe it."

If they made the decision that he was initially discharged because of the oral communication, and everything after that was merely a whitewashing of the initial decision, then there was some justification for the verdict and I think that is what we have juries for. If it was a jury trial that is for them to decide. That is my reason for denying the motion for judgment notwithstanding.

I am also not granting a new trial for the same reason. If I heard exactly the same testimony as before and everything came out in the next trial just like it did I would be sending it back to the jury and I think it's like a cat chasing its tail sending an issue back to the jury, having previously decided that under the same circumstances if you decide in favor of the defendant I will let it stand and if you decide in favor of the plaintiff I (18) will grant a new trial. That is no jury trial system, that is just the judge substituting his judgment and keep giving someone a jury trial until they lose, that is not a jury trial at all.

So the bottom line is the motion to have a non-jury trial, either a new trial or judgment based upon the fact that there was, that I submitted the matter to the jury is denied and the motion for judgment notwithstanding the verdict is denied.

The motion for a new trial is denied, but it wasn't a verdict that I could have expected. I remember four or

five times in my life I walked out of a court shaking my head wondering why a jury did what they did. Sometimes I was plaintiff's attorney and sometimes perhaps as a defendant's attorney and sometines as a state trial judge and, occasionally here in this court. This was one of these times, but they did it. They weighed it. It was their decision. I don't think it was a very good decision but I have no right, in my view, to deprive the plaintiff the benefit of the jury verdict, so the motions are all denied.

Mr. Howlett: Thank you.

The Court: I think it's a case, frankly; it's up to you, I think it's a case that should be appealed because I think this issue on a jury trial, particularly, (19) is close, and it may very well be, in light of my statement here today that the Sixth Circuit panel will read the transcript and say I should have granted either a new trial or judgment notwithstanding. It's a close case.

Mr. Rine: Thank you.

Mr. Howlett: Thank you, your Honor.

The Court: Will you prepare an appropriate order and send it in?

Mr. Rine: Yes, sir.

The Court: As soon as I sign it that starts the appeal time running.

Mr. Rine: I will prepare it and have Mr. Howlett approve it.

APPENDIX B

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Filed June 9, 1981)

(Michael Alexander, Plaintiff-Appellee, v. Chrysler Corporation, Defendant-Appellant. No. 79-1676)

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

This is an action under the Vietnam Era Veterans' Readjustment and Assistance Act of 1974, 38 U.S.C. § 2021 *et seq*, in which the plantiff claims that he was discharged by Chrysler Corporation without "cause." The only relief sought by the plaintiff was a monetary award for lost wages and benefits. (The plaintiff had relinquished any right of reinstatement in a settlement with Chrysler under the Michigan Workers' Compensation Act.) The district judge submitted this case to a jury which returned a verdict for the plaintiff in the amount of $55,000. Subsequently the district court denied Chrysler's motions for judgment notwithstanding verdict, for a new trial and for reconsideration of its earlier motion to strike the jury demand.

Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, this court concludes that the motion to strike the jury demand should have been granted. The only relief sought in this action by the plaintiff, that he be made whole for lost wages and benefits, has been held by this court to be equitable in nature. *E.g. Moore v. Sun Oil Co.*, 636 F.2d

154 (6th Cir. 1980). The fact that the plaintiff sought only monetary relief is not determinative since the particular monetary relief sought has been deemed restitution rather than legal damages.

The judgment of the district court is vacated and the cause is remanded to the district court for entry of findings of fact, conclusions of law and judgment on the basis of the record previously made.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
SEP 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-461

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL ALEXANDER,
Petitioner,
v
CHRYSLER CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Plaintiff entitled to a jury trial on his claim under the Vietnam Era Veterans' Readjustment and Assistance Act of 1974, 38 U.S.C. § 2021 *et seq.*?

SUBJECT INDEX

	Page
Question Presented	i
Constitutional Provisions And Statutes Involved	2
Statement Of The Case	4
Reasons For Denying The Writ Of Certiorari	7
Conclusion	14

INDEX TO AUTHORITIES

Cases:

Bell v. Aerodex, Inc., 473 F.2d 869 (5th Cir. 1973) 9

Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815 (5th Cir. 1972) 9

Bunnell v. New England Teamsters, 486 F. Supp. 714 (D. Mass. 1980) 11,12

Cox v. City of Kansas City, Mo., 76 F.R.D. 459 (W.D. Mo. 1977) 11,12,13

Curtis v. Loether, 415 U.S. 189 (1974) 8,9

Delman v. Federal Products Corporation, 251 F.2d 123 (1st Cir. 1958) 12

Donner v. Levine, 232 F.2d 185 (2d Cir. 1956) 10

Flynn v. Ward Leonard Electric Co., 84 F. Supp. 399 (S.D.N.Y. 1949) 10

Goodman v. McDonnell Douglas Corp., 456 F. Supp. 874 (E.D. Mo. 1978), *aff'd*, 606 F.2d 800 (8th Cir. 1979), cert. denied, 446 US. 913 (1980) 11

Page

Great American Fed. S & L Assn. v. Novotny, 442 U.S. 366 (1979) 8

Hood v. General Motors, 96 L.R.R.M. 2570 (E.D. Mich. 1977) 11,12,13

Kidder v. Eastern Air Lines, Inc., 469 F. Supp. 1060 (S.D. Fla. 1978) 8

Lehman v. Nakshian, 49 U.S.L.W. 4835 (1981) .. 8

Lorillard v. Pons, 434 U.S. 575 (1978) 9,12

Mowdy v. Ada Board of Education, 76 F.R.D. 436 (E.D. Okla. 1977) 11,12 13

Rogers v. Exxon Research & Engineering Company, 550 F.2d 834 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978) 12

Ross v. Bernhard, 396 U.S. 531 (1970) 7

Ufland v. Buffalo Courier Express, Inc., 394 F. Supp. 199 (W.D.N.Y. 1974) 10,11,12

Vannevar v. Bryant, 88 U.S. 41 (1874) 9

Constitutional Provisions:

Seventh Amendment to the Constitution of the United States 2,7

Statutes:

Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 *et seq.*) 8,9

Title VII, Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(g)) 8

Page

Title VIII, Civil Rights Act of 1968 (42 U.S.C. § 3612) 9

Vietnam Era Veterans' Readjustment and Assistance Act of 1974 (38 U.S.C. § 2021 *et seq.*) ... 2,3 4,7-13

Miscellaneous:

Letter to Senate Armed Services Committee dated May 22, 1974, from Secretary of Labor Peter Brennan 11

Senate Report No. 93-907, 93d Cong., 2d Sess. (1974) 10-11

No. 81-461

IN THE

Supreme Court of the United States

October Term, 1981

MICHAEL ALEXANDER,
Petitioner,
v
CHRYSLER CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Chrysler Corporation respectfully requests that this Court deny the petition for writ of certiorari in this case seeking review of the Order of the United States Court of Appeals for the Sixth Circuit issued as a mandate on July 1, 1981.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the United States Constitution provides that:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

38 U.S.C. § 2021(b)(1) in pertinent part provides that:

> "Any person who is restored to or employed in a position in accordance with the provisions . . . of this section . . . shall not be discharged from such position without cause within one year after such restoration or reemployment."

38 U.S.C. § 2022 provides that:

> "If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, *shall have the power*, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, *specifically to require such*

employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter." (Emphasis added)

STATEMENT OF THE CASE

1. PROCEEDINGS BELOW

On February 14, 1978, Plaintiff Michael Alexander filed a complaint with the United States District Court for the Eastern District of Michigan ("district court") pursuant to the Vietnam Era Veterans' Readjustment and Assistance Act of 1974 ("1974 Veterans' Act") challenging his discharge by Chrysler Corporation ("Chrysler"). Plaintiff could not seek reinstatement because, in his settlement of a Worker's Disability Compensation claim filed against Chrysler subsequent to his termination, he resigned any future employment rights with Chrysler as of May 14, 1979. "The claim in this case, therefore, [was] for lost earnings dating from the date of discharge, January 14, 1976 to May 14, 1979" (App. 4).[1] Plaintiff filed a demand for jury trial with his Complaint.

Chrysler denied his claim, contending that Plaintiff was discharged because he struck his supervisor, and that this striking of his supervisor, especially when viewed in light of Plaintiff's prior history of on-the-job violence, constituted "cause" within the meaning of the 1974 Veterans' Act.

Prior to trial, Chrysler sought to have the district court strike Plaintiff's jury demand. That request was refused, and the case was tried to a jury which returned a verdict in the amount of $55,000.00. Subsequent to trial, Chrysler, in addition to a motion for judgment notwithstanding the verdict and a motion for new trial, moved the district court to reconsider the earlier ruling

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[1] Page references are to the Joint Appendix filed with the United States Court of Appeals for the Sixth Circuit.

as to Plaintiff's jury demand and to set the verdict aside on the basis that Plaintiff had not been entitled to a jury trial. The district court denied that motion.

Chrysler appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit vacated the ruling of the district court, set aside the jury verdict and remanded the case for decision by the district court.

2. FACTUAL SUMMARY OF CASE

Plaintiff was a Chrysler employee who left his employment on a military leave of absence in August 1975, and was reinstated to his employment after returning from the military on December 8, 1975. Plaintiff was thereafter discharged by Chrysler, his last day of work being January 14, 1976.

Plaintiff was discharged after admittedly striking his supervisor John Robbins twice in the face during the course of an argument (App. 15, 135-136), even though Robbins had not struck Plaintiff but at most had placed a hand on his shoulder and perhaps stepped on his foot (App. 15, 135, 141, 148). Plaintiff's own union steward testified that Plaintiff struck Robbins so hard that he knocked his helmet and safety glasses off, and that Robbins did not strike Plaintiff, even after the first blow (App. 23, 135-136, 148, 158).

Previously, in 1974, Plaintiff had been discharged by Chrysler for striking a different supervisor (App. 21). As a result of a compromise in the grievance procedure, Plaintiff had been reinstated by Chrysler some 34 days after this 1974 incident, but without any backpay (App. 21).

Plaintiff had also been suspended in December 1975, the very month of his return from the Navy and only one month before his final discharge, for refusing to follow the instructions of yet a third supervisor and for threatening him and other supervisors. Plaintiff also admittedly told the plant security guards that if they so much as put their hands on him "he would kill them" (App. 21-23). As a result of this 1975 incident, Plaintiff was transferred to another department and shift (App. 23).

The relevant collective bargaining agreement between Chrysler and Plaintiff's union, the United Auto Workers ("UAW"), expressly provided that the past disciplinary record of an employee could be taken into account for up to five years in subsequent disciplinary determinations (App. 64).

Chrysler Personnel Manager Howard Bothwell testified that it was Chrysler's practice never to discharge an employee before an investigation by the Labor Relations Department and that the Department considered an employee's past record before any final decision was reached (App. 44-45, 66-67). Consistent with Bothwell's testimony, Plaintiff admitted at trial that he met with the Labor Relations Supervisor Walter Ector subsequent to the January 1976 incident in which he twice struck Robbins, and that it was Ector who in fact fired him (App. 25).

The UAW filed a grievance protesting Plaintiff's discharge, but withdrew it in the early stages of the grievance procedure because of Plaintiff's past record (App. 34).

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. THE DECISION BELOW IS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT CONCERNING THE RIGHT TO A JURY TRIAL.

This Court has established three factors to consider in determining whether an issue is legal in nature and thus subject to the right to a jury trial pursuant to the Seventh Amendment.[2] As set out in *Ross* v. *Bernhard*, 396 U.S. 531, 537-38 (1970), those factors are:

(1) Custom prior to the merger of law and equity in the district courts;

(2) The remedy sought; and

(3) The practical abilities and limitations of juries.[3]

No custom prior to the merger of law and equity in the district courts is applicable because this cause of action was created by statute subsequent to that merger.

An action under the 1974 Veterans' Act is, however, analogous to a traditional equitable action for restitution. Indeed, the Sixth Circuit below described this action as

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[2] Plaintiff has not, and does not, claim the 1974 Veterans' Act provides a statutory right to a jury trial; his only claim is pursuant to the Seventh Amendment. The Seventh Amendment discussion, however, will demonstrate that no statutory right to a jury trial was created by the 1974 Veterans' Act.

[3] Because the remedy provided under the 1974 Veterans' Act is conclusively equitable, Chrysler will not discuss the practical abilities and limitations of juries under the 1974 Veterans' Act in this Brief.

one seeking restitution. Moreover, the courts have increasingly recognized the analogy between actions under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g), and those arising under the 1974 Veterans' Act, particularly as to matters of remedy and procedure, *Kidder* v. *Eastern Air Lines, Inc.*, 469 F. Supp. 1060, 1064 n.3 (S.D. Fla. 1978) (and the cases cited therein), and "in Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution." *Curtis* v. *Loether*, 415 U.S. 189, 197 (1974).

The remedy provided in the 1974 Veterans' Act, and thus sought here, is equitable, not legal, in nature. Both the express language and the legislative history of that Act's enforcement provisions confirm that the remedy provided in the 1974 Veterans' Act's enforcement provision is equitable in nature. Significantly, the Act does not provide for "legal" relief or for "damages"; instead, it gives the district court (not a jury) power specifically to require compliance and to fashion a make-whole remedy; in other words, it grants equitable powers.

As discussed above, the remedy provision in the 1974 Veterans' Act is analogous to the one in Title VII. See *Kidder, supra*. The Title VII remedy provision consistently has been held to be equitable in nature — with backpay an integral part of the equitable remedy — with no right to a jury trial. See, e.g., *Lehman* v. *Nakshian*, 49 U.S.L.W. 4835, 4837 (1981); *Great American Fed. S & L Assn.* v. *Novotny*, 442 U.S. 366, 375 (1979).

In contrast, the Age Discrimination in Employment Act ("ADEA") expressly empowers a court to grant "legal or equitable relief"; and authorizes individuals to bring actions for "legal or equitable relief." 29 U.S.C. § 626(b),

(c). In finding a right to jury trial under the ADEA, this Court in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), emphasized that the presence or absence of the term "legal relief" in the enforcement provision of a cause of action created by statute is critical to the jury trial issue:

> The word "legal" is a term of art: in cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial. 434 U.S. at 583.

The 1974 Veterans' Act also does not provide for "damages," another term of art which would suggest an action at "law." See *Curtis, supra*, where this Court found a right to jury trial in suits under Title VIII of the Civil Rights Act of 1968, relying upon the express statutory creation of an action for "damages."

Indeed, the only term of art, if any, used in § 2022 of the 1974 Veterans' Act is "hearing." ("The Court shall order speedy hearing in any such case and shall advance it on the calendar.") A "hearing" describes the examination of facts at issue in equitable actions; a "trial" is the comparable description in a legal action. *Vannevar* v. *Bryant*, 88 U.S. 41, 43 (1874).

The legislative history of the 1974 Veterans' Act further demonstrates that it provides, and its predecessors provided, equitable, not legal, relief. The 1974 Veterans' Act was a re-enactment and re-codification; at the same time, however, Congress made a significant change in the 1974 Veterans' Act's enforcement provision, 38 U.S.C. § 2022, by adding the qualification: "No statute of limitations shall apply to any proceedings under this chapter." The Fifth Circuit Court of Appeals had held in *Blair* v. *Page Aircraft Maintenance, Inc.*, 467 F.2d 815 (5th Cir. 1972), and *Bell* v. *Aerodex, Inc.*, 473 F.2d 869 (5th Cir. 1973), that an action for backpay under the predecessor to

the 1974 Veterans' Act, particularly if severed from an action for reinstatement, sought "legal" relief and could therefore be barred by statutes of limitation; other courts had reached the contrary conclusion that the action was "equitable" and that only the doctrine of laches applied.[4] The Report of the Senate Committee on Veterans' Affairs stated:

> There is also added a provision at the end of this section which *reaffirms and reflects more clearly the congressional intent that legal proceedings under this chapter shall be governed by equity principles of law*, specifically by barring the application of State statutes of limitations to any such proceeding. Congress, in 1940, omitted any reference to the application of any time-barred defense in cases arising under this law, in part to insure the application of a policy of keeping enforcement rights available to returned veterans as uniform as possible throughout the country. The equity doctrine of laches accomplishes this purpose as nearly as possible.
>
> Therefore, those court decisions which have either applied a State statute of limitations to completely bar a claim under the prior law [citing *Blair* and *Bell*] or have applied a state statute of limitations to partially bar a claim under the prior law [citing *Gruca* v. *U.S. Steel Corp.*, 495 F.2d 1252 (3d Cir. 1974), and *Smith* v. *Continental Airlines, Inc.*, 70 C.C.H. Labor Cases ¶13,501 (C.D. Cal. 1973)] are not in accord with the intent

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[4] E.g., *Ufland* v. *Buffalo Courier Express*, 394 F. Supp. 199 (W.D.N.Y. 1974); *Donner* v. *Levine*, 232 F.2d 185 (2d Cir. 1956); *Flynn* v. *Ward Leonard Electric Co.*, 84 F. Supp. 399 (S.D.N.Y. 1949).

> of Congress as to the application of time-barred defenses. S. Rep. No. 93-907, 93d Cong., 2d Sess. at 111-12 (1974) (emphasis added).

And in a letter to the Senate Armed Services Committee dated May 22, 1974, Secretary of Labor Peter Brennan stated in support of the legislation:

> This amendment would clarify the original intent of Congress that *all re-employment rights actions* under the Act are to be governed by equitable principles. *Id.* at 139 (emphasis added).

Since the 1974 amendments, lower courts uniformly have found that the 1974 Veterans' Act provides an equitable remedy, not a legal one. *Goodman* v. *McDonnell Douglas Corp.*, 456 F. Supp. 874, 876 n.1 (E.D. Mo. 1978), *aff'd* 606 F.2d 800 (8th Cir. 1979), *cert. denied*, 446 U.S. 913 (1980); *Bunnell* v. *New England Teamsters*, 486 F. Supp. 714, 719 (D. Mass. 1980); *Ufland* v. *Buffalo Courier Express, Inc.*, 394 F. Supp. 199, 201, (W.D.N.Y. 1974).

Accordingly, the lower courts facing the issue consistently have found that a jury trial is not available as a matter of right under the 1974 Veterans' Act. *Mowdy* v. *Ada Board of Education*, 76 F.R.D. 436 (E.D. Okla. 1977); *Cox* v. *City of Kansas City, Mo.*, 76 F.R.D. 459 (W.D. Mo. 1977); *Hood* v. *General Motors*, 96 L.R.R.M. 2570 (E.D. Mich. 1977).

2. NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND OTHER LOWER COURT DECISIONS UNDER THE 1974 VETERANS' ACT.

The Sixth Circuit Court of Appeals in this case is the first appellate court to consider the issue of a right to a jury trial under the 1974 Veterans' Act. Its decision that a

jury trial is not available as a matter of right is consistent with every reported trial court decision on that issue. *Mowdy, supra; Cox, supra;* and *Hood, supra.*[5]

Plaintiff mistakenly argues that *Delman* v. *Federal Products Corporation*, 251 F.2d 123 (1st Cir. 1958), is in conflict with the decision below. The *Delman* court, however, only discussed the jury issue in *dictum*, and at most indicated that a claim for reinstatement was "essentially equitable" and a claim for monetary relief was "essentially legal," and did not decide whether the claim for monetary relief was separate and distinct or merely an appendage to the equitable claim. Furthermore, *Delman* was decided prior to the 1974 amendments and thus under an earlier statute; and to the extent it held "legal" relief was available under the earlier Veterans' Act, the legislative history and subsequent cases have demonstrated that *Delman* is no longer a good precedent and, in fact, was decided incorrectly. *Goodman, supra; Bunnell, supra* and *Ufland, supra.*

Nor is the decision below in conflict with *Rogers* v. *Exxon Research & Engineering Company*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978), as claimed by Plaintiff. The *Rogers* case was an action under the ADEA, not the 1974 Veterans' Act, and is thus controlled by this Court's analysis in *Lorillard, supra.*

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[5] An exhaustive review of cases decided under the 1974 Veterans' Act since the 1974 amendments did not reveal a single case which had been tried to a jury, even where the jury issue was not raised.

3. THE INTERESTS OF JUDICIAL ECONOMY AND EFFICIENCY WOULD NOT BE SERVED BY A GRANT OF CERTIORARI HERE.

Every reported trial court decision under the 1974 Veterans' Act which has addressed the jury trial issue has held no right to a jury trial exists. *Mowdy, supra; Cox, supra;* and *Hood, supra*. Moreover, now the only appellate court to address the issue, the Sixth Circuit Court of Appeals in the instant matter, also has held that a jury trial is not available under the 1974 Veterans' Act as a matter of right.

The United States Attorney, pursuant to 38 U.S.C. § 2022, is charged with appearing and acting as attorney for those claimants he believes have valid claims under the 1974 Veterans' Act. In *Hood, supra*, the U.S. Attorney for the Eastern District of Michigan, together with the U.S. Department of Labor, took the position that no right to a jury trial existed under the 1974 Veterans' Act. Moreover, in *Mowdy* and *Cox* the U.S. Attorney representing each of those plaintiffs successfully moved to strike the jury demand.

Thus the courts and the government officials charged with enforcing the Act uniformly have taken the position that no right to a jury trial exists under the 1974 Veterans' Act. Moreover, all four reported judicial decisions which have addressed the jury trial issue since 1974, including the Court of Appeals decision below, have held that there is no right to a jury trial under the 1974 Veterans' Act. Accordingly, interests of judicial economy and efficiency in the trial courts are not involved here, and no clarification or direction is needed from this Court.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 28, 1981